Supreme Court, U.S.
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No. 96-744

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOHN M. WEIBLE,

Petitioner,

v.

DOCTOR'S ASSOCIATES, INC. and
FRANCHISE WORLD HEADQUARTERS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly found that on the particular facts of this case there was insufficient evidence to conclude that respondents' timely motions for judgment as a matter of law violated the specificity requirement of Rule 50(a)(2) of the *Federal Rules of Civil Procedure*.

2. Whether the Court of Appeals correctly concluded that, even if respondents' timely motions did not satisfy the specificity requirement of Rule 50(a)(2), the court could nonetheless direct judgment to be entered for respondents to prevent manifest injustice in view of the court's factual finding that petitioner did not, and could not, present evidence to support his abuse of process claim under Connecticut law.

STATEMENT PURSUANT TO RULE 29.6

Respondents state that they have no parent companies, and that they have no subsidiaries (other than wholly-owned subsidiaries).

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STATUTORY PROVISION INVOLVED

Rules 50(a) and (b) of the *Federal Rules of Civil Procedure* provide as follows:

(a) **Judgment as a Matter of Law.**

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with

respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) **Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.** If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment -- and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:
(A) allow the judgment to stand,
(B) order a new trial, or
(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned:
(A) order a new trial, or
(B) direct entry of judgment as a matter of law.

F.R.C.P. 50(a), (b).

STATEMENT OF THE CASE

Respondent Doctor's Associates, Inc. ("DAI") is the national franchisor of Subway sandwich shops, and respondent Franchise World Headquarters, Inc. ("FWHI") provides administrative services to DAI. Petitioner John Weible is a former franchisee who owned and operated a Subway restaurant in California. In 1991, petitioner filed a 329-page, 22-count complaint in California state court against DAI and numerous entities and individuals, alleging an array of common law violations arising out of his franchise relationship and seeking damages exceeding $26 million. Petitioner's Appendix ("A") at 4. The California court stayed that action in favor of arbitration pursuant to the standard arbitration clause in Mr. Weible's franchise agreement with DAI. The next year, Mr. Weible filed a demand for arbitration against DAI with the American Arbitration Association, seeking $800,000 in compensatory damages and $30 million in punitive damages. *Id.*

During the course of that arbitration, officials at DAI and FWHI became concerned about the security of the companies' voice mail system. They conducted an investigation, which led them to conclude that since at least July 1991, Mr. Weible had gained unauthorized access to messages left on the voice mailboxes of Frederick DeLuca, the founder, co-owner and president of DAI, and Leonard Axelrod, a vice-president of both DAI and FWHI who supervises the companies' legal affairs. Accordingly, DAI sought permission from the arbitrators to file a counterclaim against petitioner in the pending arbitration based on the apparent intrusions into the voice mail system. *Id.* In October 1992, the arbitrators ruled that these claims were beyond the scope of the arbitration clause and denied DAI permission to add its proposed counterclaim to the pending arbitration. A-5. The arbitration then proceeded in the ordinary course and in August 1993, the arbitrators awarded petitioner $219,900 on all of his claims. Thereafter, DAI paid the arbitrators' award in full, plus interest. *Id.*

Prompted by the arbitrators' refusal to permit DAI to arbitrate the voice mail claims, respondents filed this action in the

United States District Court for the District of Connecticut. The lawsuit sought statutory damages, punitive damages and attorneys' fees under the Oral Communications Act, 18 U.S.C. § 2510 *et seq.* and the Stored Wire and Electronic Communications and Transactional Records Access Act, 18 U.S.C. § 2701 *et seq. Id.* In his answer, petitioner asserted a counterclaim for common law abuse of process in which he charged that this action was filed for the ulterior purpose of coercing him to settle his California lawsuit and his arbitration demand for less than the "true and fair value of those claims." *Id.*

From the beginning, respondents contended that petitioner's abuse of process counterclaim failed to state a claim under Connecticut's common law because it alleged that respondents had committed abuse of process in the mere **filing** of their complaint, rather than in any act or misconduct during the course of the litigation, as required by Connecticut law. A-5. Thus, in a timely motion to dismiss under Rule 12(b)(6) of the *Federal Rules of Civil Procedure*, respondents argued that Mr. Weible's counterclaim was in reality a claim for vexatious litigation that lacked the essential element of that tort under Connecticut law, namely the termination of the lawsuit in petitioner's favor. *Id.*

The motion to dismiss was referred to a Magistrate Judge, who issued a Recommended Ruling denying the motion on the ground that Mr. Weible's counterclaim set forth the elements of an abuse of process claim. *Id.* This recommendation was later endorsed by the District Court. Thereafter, this case proceeded in normal fashion, through discovery, pre-trial proceedings and trial. *Id.*

At trial, respondents introduced extensive evidence demonstrating that petitioner had illegally listened to voice mail messages intended for Messrs. DeLuca and Axelrod. A-6. For example, records from the companies' long-distance telephone carrier showed that between July 1, 1991 and January 31, 1992, "about 900 calls . . . were made from [petitioner's] home telephone to the toll-free number that provides outside

access," by use of confidential access codes, "to [DAI's] voice mail system." *Id.* Yet during that period, Mr. Weible had no business relationship with either DAI or FWHI and thus no legitimate reason to be making 900 phone calls to that toll-free number, particularly since the vast majority of these calls were made outside normal business hours, with many coming between midnight and 5:00 a.m., E.S.T. *Id.* Furthermore, in a roughly 26-hour period after the companies had changed the security codes for the voice mailboxes, approximately 105 phone calls were placed from petitioner's home to the companies' toll-free number. As respondents' expert testified at trial, the overwhelming number of these calls corresponded with attempts to break into the voice mailboxes of Messrs. DeLuca and Axelrod. *Id.*

The evidence offered at trial in support of petitioner's abuse of process counterclaim was, like his counterclaim itself, limited solely to respondents' alleged "ulterior motive" in filing this action.[1] However, as to the theory alleged in the counterclaim --namely, that this action was "really" filed to convince him to withdraw or settle his arbitration claim for less than it was worth -- petitioner admitted that nobody acting on behalf of DAI or FWHI had ever initiated settlement discussions with him or anyone acting on his behalf. A-20. In fact, he never produced any evidence that, once this lawsuit was filed, respondents ever used the claims in this proceeding in any manner to get him to withdraw or settle his arbitration claims for any amount, let alone for "less than they were worth." *Id.* The evidence at trial also showed that even after DAI fully paid petitioner's arbitration award (thereby removing the potential use of this lawsuit as a purported "bargaining

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[1] This "proof" consisted entirely of three points: (1) that respondents never sued another employee, who also had gained unauthorized access to the voice mail system; (2) that in February, 1992, nearly a year **before** this lawsuit was filed, Mr. Axelrod allegedly threatened to bring this action unless Mr. Weible withdrew his claims against DAI; and (3) that respondents knew that petitioner was not wealthy and would be unlikely to pay a judgment. A-6 to -7.

chip" to eliminate his arbitration claims), respondents continued to pursue this action against petitioner to judgment. *Id.* In sum, petitioner did not allege or produce any evidence at trial that DAI or FWHI committed any act of misuse, abuse or misconduct of any kind **during** the pendency of this proceeding or trial. A-19.

Accordingly, respondents timely moved for judgment as a matter of law on petitioner's counterclaim at the close of all the evidence, arguing that he had not presented any evidence of abuse of any process during the course of this litigation as Connecticut law required. A-10 to -11. In connection with this oral motion for judgment as a matter of law, respondents' counsel engaged in a brief discussion with the trial judge regarding petitioner's evidence and the necessary elements of his cause of action under Connecticut law. *Id.* However, the District Court cut short counsel's explanation of the facts and law supporting his motion and summarily denied the motion, therefore submitting petitioner's counterclaim to the jury. A-13.

In his closing arguments, petitioner's counsel summed up the evidence on his client's abuse of process counterclaim as follows: "The purpose of this lawsuit against him was to get him to drop [his arbitration]. . . . If that is a purpose and if you believe that is the purpose, that is improper. That is abuse of process." Consistent with this closing argument, the District Court, in charging the jury, also erroneously directed them to find for petitioner on his counterclaim if they concluded that respondents had filed this lawsuit with an improper motive. A-17.

The jury returned a verdict against respondents on their voice mail claims and in favor of petitioner on his abuse of process counterclaim, awarding him a total of $210,000 ($95,000 in compensatory damages and $115,000 in punitive damages). A-7. DAI and FWHI then timely renewed their motion for judgment as a matter of law on petitioner's counterclaim. *Id.* Petitioner opposed this motion and raised, for the first time, his claim that respondents were procedurally barred

from moving for judgment as a matter of law because their motion at the close of the evidence lacked the specificity required by Rule 50(a)(2) of the *Federal Rules of Civil Procedure*. A-14 n.1.

The District Court denied respondents' renewed motion for judgment as a matter of law. Despite petitioner's claim that respondents' oral motion at the close of the evidence lacked the required specificity, the District Court addressed the substance of respondents' motion. *Id.* The court thus did not find, as petitioner argued, that respondents' post-trial motion raised new grounds that had not been raised properly before the case was submitted to the jury. Nor did the trial judge find that the oral motion was vague or otherwise procedurally defective in any manner that would prevent the court from reaching the merits of respondents' post-trial motion.

Instead, the trial court recognized that respondents' post-trial motion for judgment advanced the identical arguments that they had asserted from the beginning of this case. Thus, the District Court observed that in their post-trial motion DAI and FWHI were trying to "reargue" their contention, made as early as their motion to dismiss, that Mr. Weible's allegations of improper motive in the filing of this case did not state a claim for abuse of process under Connecticut law. Respondents' Appendix ("R.A.") at A-2. Because the Magistrate Judge had recommended that DAI's motion to dismiss be denied and the District Court had endorsed that recommendation, the trial judge erroneously concluded that the sufficiency of the evidence submitted at trial on Mr. Weible's abuse of process claim was a "settled issue" that the court was precluded from considering; it was, according to the court, "clearly the law of the case." *Id.*; *see* A-17. Therefore, despite his "doubts as to the correctness" of the Magistrate Judge's ruling, the trial judge incorrectly believed that he could not evaluate the trial evidence on the basis of a correct statement of Connecticut law. R.A.-2.

Respondents timely appealed the District Court's denial of their motion for judgment as a matter of law on petitioner's

counterclaim. A-2. On August 12, 1996, the United States Court of Appeals for the Second Circuit issued its decision on the appeal. The court rejected the procedural challenge that forms the basis of this Petition and after finding that Mr. Weible "did not (and could not)" present evidence to sustain his claim under a correct statement of Connecticut law, the court ordered judgment in respondents' favor on petitioner's counterclaim. A-14, -22.

The Second Circuit's analysis proceeded in several steps. First, the court correctly recognized that Rule 50(a) of the *Federal Rules of Civil Procedure* required respondents' motion for judgment as a matter of law at the close of the evidence to specify the grounds upon which it was based in order to provide Mr. Weible with an opportunity to correct any defects in his proof before the case went to the jury. A-13. The court then reviewed the facts and circumstances surrounding that motion to determine whether it satisfied Rule 50(a)(2)'s specificity requirement. For two reasons, the court found that it could not conclude that respondents had failed to satisfy the Rule: (1) The record of the oral colloquy between respondents' counsel and the court was confusing; and (2) the trial court had "mudd[ied]" the waters by cutting short counsel's argument. *Id.* The Second Circuit found it significant that the District Court, which was most familiar with the arguments counsel had made during trial, did not reject respondents' post-trial motion for failure to comply with the specificity requirement of Rule 50(a)(2). A-14 n.1.

Next, the Second Circuit concluded that, even if respondents' motion had not satisfied the specificity requirement of Rule 50, the court could still consider their sufficiency of the evidence claims in order to prevent manifest injustice under the particular facts of the case. As the court observed, "Although the 'specificity requirement is obligatory,' we will not woodenly apply it merely to allow 'an unwarranted triumph of form over substance.'" A-14. The Second Circuit found that the District Court's instruction to the jury -- that they could find for petitioner if they concluded that respondents had merely filed this lawsuit with an improper motive --

was completely contrary to the law of Connecticut. As the court recognized, Connecticut's common law of abuse of process, like the law of nearly every other jurisdiction, required a showing that respondents misused or abused some legal process **during** the course of this litigation. A-15 to -16. After considering the evidence, the court found that "[u]nder Connecticut law as properly stated, Weible **did not (and could not)** present evidence to sustain a verdict that plaintiffs misused the legal process here." A-14 (emphasis added). The court specifically and carefully considered all of the evidence that petitioner claimed he would have submitted to the jury if respondents' motion for judgment had, as petitioner alleged, been more specific. Nevertheless, the court concluded that none of that "evidence" would have justified a jury in ruling in Mr. Weible's favor on his abuse of process counterclaim under a proper statement of Connecticut law. A-21 to -22.

REASONS FOR DENYING THE PETITION

The Court should deny the Petition for several reasons. First, the Second Circuit's decision rejecting petitioner's contention that respondents' motion for judgment as a matter of law violated Rule 50(a)(2)'s specificity requirement was based upon well established and correctly stated principles of law and a close examination of the particular facts before the court. There is no reason for this Court to redetermine those facts.

Second, the Second Circuit's additional, independent holding that the court could review the record to prevent manifest injustice, even if respondents' motion failed to meet the specificity requirement of Rule 50(a)(2), is unnecessary to a determination of this case, and is also unremarkable and unquestionably correct. Contrary to petitioner's claim, the Second Circuit's decision is consistent with that of other jurisdictions. No circuit court has ever held that the specificity requirement of Rule 50 prohibits a court from preventing manifest injustice or reversing plain error. Thus, not one of the cases petitioner relies upon supports his assertion of a conflict. Worse yet, he relies upon cases from supposedly

"conflicting" circuits that in fact endorse and apply the manifest injustice standard relied upon by the Second Circuit.

Third, there is absolutely no reason for this Court to issue a nationwide, one-size-fits-all standard for the application of the manifest injustice standard, as petitioner requests. Courts have had no difficulty applying this common appellate standard on a case-by-case basis, upon a close review of the facts of each case and consideration of whether the purposes of Rule 50 have been met. It is, therefore, both unnecessary and unwise for this Court to grant certiorari to articulate uniform national standards under Rule 50(a)(2).

I. THE SECOND CIRCUIT CORRECTLY APPLIED WELL ESTABLISHED RULES TO THE PARTICULAR FACTS OF THIS CASE

A. The Second Circuit correctly rejected petitioner's procedural challenge to respondents' motion for judgment as a matter of law at the close of the evidence based upon well established principles of law and the particular facts of this case. Accordingly, there is no need for this Court to grant the Petition.

There is no question that the Second Circuit correctly articulated the governing legal rule, namely that Rule 50 generally prohibits judgment as a matter of law unless the movant specifically raised the ground for that motion in an earlier motion at the close of all the evidence. A-10. The court expressly recognized, as petitioner himself argues, that the "specificity requirement is obligatory and ensures that the other party is made aware of any deficiencies in proof that may have been overlooked." *Id.* (quoting *Lambert v. Genesee Hosp.*, 10 F.3d 46, 54 (2d Cir. 1993, *cert. denied*, 114 S.Ct. 1612 (1994)). Thus, petitioner's real complaint is not that the Second Circuit applied an erroneous legal standard, but rather that the court erred in applying this well established rule to the particular facts presented.

Obviously, that contention, even assuming it had merit, does not present an issue that warrants this Court's review. Moreover, as the Second Circuit recognized, the record in this case does not demonstrate that respondents violated Rule 50. There can be no doubt that respondents' counsel timely moved for judgment as a matter of law at the close of the evidence on the ground that petitioner's evidence was insufficient to sustain his claim of abuse of process. A-11 to -13 ("[W]e . . . move for [a] directed verdict on the counterclaim . . ."). While the Second Circuit expressed some difficulty in retrospectively discerning the precise arguments advanced in support of that motion based upon the oral colloquy between counsel and the trial judge, the court recognized that this lack of clarity was in large part due to the fact that the District Court cut short counsel's explanation of the grounds for his motion. A-13. That the trial court stopped counsel in mid-sentence simply underscores the fact that the trial judge understood perfectly well the basis for respondents' motion and did not need to hear additional arguments. After respondents timely renewed their motion following entry of the verdict, the court again denied the motion but not because of any lack of specificity in the earlier oral motion, but rather because the court wrongly believed that it was bound to apply an incorrect statement of Connecticut's common law in determining the sufficiency of petitioner's evidence on his abuse of process counterclaim. Indeed, the court characterized respondents' post-trial motion as simply "reargu[ing]" their earlier motion that petitioner's evidence of improper motive alone was insufficient under Connecticut law to sustain an abuse of process claim. A-17. The trial court was in the best position to know whether counsel had been sufficiently specific in his close-of-the-evidence motion, and that court obviously believed that respondents' motion was plenty specific.

With this clear evidence that the trial court knew precisely the grounds for respondents' motion and the confused record of the oral colloquy that was cut short by the trial judge, the Second Circuit was more than justified in concluding that the factual record of this case did not establish that respondents

had violated Rule 50(a)(2)'s specificity requirement. A-13 to -14.[2] There is no reason for this Court to review that factual determination.

B. The Second Circuit went on to conclude that even if respondents' motion at the close of the evidence did not satisfy Rule 50(a)(2)'s specificity requirement, the court could nonetheless act to prevent manifest injustice "[u]nder the facts of this case." A-14 to -15. This alternative holding by the Second Circuit does not warrant review by this Court. As an initial matter, it is important to note that the facts of this case do not require, let alone present an opportunity for, this Court to reach the Second Circuit's alternative holding because, as discussed above, petitioner failed to demonstrate on this record that respondents violated the specificity requirement of Rule 50(a)(2). More fundamentally, however, this alternative holding is unremarkable and unquestionably correct on the particular facts of this case.

Petitioner does not dispute that the lower court erred in defining the elements of abuse of process under Connecticut law, although he calls this error "somewhat hyper-technical." Petition at 15. Nor does petitioner contest the Second Circuit's finding that the evidence that he presented at trial -- as well as the additional evidence he claimed he could have presented had respondents' motion been more specific -- did not establish abuse of process under a correct statement of Connecticut law. He also does not dispute that respondents made timely motions for judgment on the ground of insufficiency of the evidence at **both** the close of all the evidence and **after** the jury returned its verdict. Petitioner nevertheless contends that despite these circumstances, the Second Circuit was precluded from preventing manifest injustice in this case because the timely motion for judgment at the close of the evidence

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[2] Thus, the Second Circuit specifically relied on *Miller v. Premier Corp.*, 608 F.2d 973, 979 n.3 (4th Cir. 1979) and the following statement of that decision's holding: "colloquy between the Court and counsel was 'too confusing to permit confident assessment' that counsel failed to satisfy Rule 50(a)."

was not, according to petitioner, specific enough to satisfy Rule 50(a)(2).

Petitioner's view of the law is simply wrong. The Second Circuit's alternative holding that it could review the merits of respondents' sufficiency of the evidence claim in order to prevent manifest injustice is entirely consistent with the holdings of numerous other courts that regularly review district court judgments for plain error or to prevent manifest injustice, even in circumstances where (unlike here) **no** motion for judgment was filed at the close of evidence or after the verdict.[3] Thus, a leading commentary observes: "[C]ourts say that on appeal they may consider the insufficiency of the evidence, despite the failure to move for judgment as a matter of law, if it constitutes plain error apparent on the face of the record that, if not noticed, would result in a manifest miscarriage of justice." 9A Wright & Miller, *Federal Practice and Procedure* § 2536 at 331 (1995 & Supp.); *see, e.g., Polanco v. City of Austin*, 78 F.3d 968, 975 (5th Cir. 1996) (failure to renew motion before the close of all evidence does not preclude appellate court from reviewing sufficiency of the evidence); *McKeel v. City of Pine Bluff*, 73 F.3d 207, 212 (8th Cir. 1996) (appellate court reviews "record to see if the manifest injustice exception to Rule 50(b) applies," even where no motion was made for judgment as a matter of law); *Simon v. Navon*, 71 F.3d at 13 ("a claim for judgment as a matter of law may not be revived on appeal except upon a showing of plain error resulting in a manifest miscarriage of justice");

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[3] When no post-verdict motion for judgment is made at all, some appellate courts have limited the relief they were willing to grant to a new trial only. *See, e.g., Simon v. Navon*, 71 F.3d 9, 13 (1st Cir. 1995); *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 854 (Fed. Cir. 1991), *cert. denied*, 504 U.S. 980 (1992). Here, however, it is undisputed that respondents made timely pre- and post-verdict motions for judgment as a matter of law, and therefore, the Second Circuit was fully justified in granting judgment for respondents after considering not only the evidence petitioner adduced at trial, but also the evidence that he claimed he would have presented had respondents' motion been "more specific." A-19 to -20; *see, e.g., Singer v. Dungan*, 45 F.3d 823, 830 (4th Cir. 1995).

Singer v. Dungan, 45 F.3d at 827-28 (even though issue not raised in motion for judgment at the close of the case, court reversed judgment where "[p]lain error would result here if the evidence were not reviewed"); *Narey v. Dean*, 32 F.3d 1521, 1526-27 (11th Cir. 1994) (appellate courts will review issues not raised in pre-verdict motion for judgment as a matter of law in exceptional circumstances); *First Security Bank v. Taylor*, 964 F.2d 1053, 1057 (10th Cir. 1992) (where grounds not raised in directed verdict motion, court will still review sufficiency of evidence for plain error); *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 479 (9th Cir. 1991) (where no motion made at close of all evidence, appellate review still permitted where "plain error was committed which, if not noticed, would result in a manifest miscarriage of justice"); *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d at 854 ("[w]hen no motion challenging the legal sufficiency of the evidence has been made at any stage in the district court, the law is uniform in all circuits that review is limited to plain error").[4]

The Second Circuit's application of this well established standard to the particular facts of this case certainly does not present a question that warrants the grant of certiorari. A-14. Contrary to petitioner's unfounded contentions, the Second Circuit's entry of judgment in favor of respondents on the facts of this case is fully consistent with the policies of Rule 50. As the Advisory Committee Notes to that Rule make clear, Rule 50 is aimed at facilitating "the exercise by the court of its responsibility to assure the fidelity of its judgment to the controlling law, a responsibility imposed by the Due Process Clause of the Fifth Amendment." Fed. R. Civ. Pro. 50, Advisory Committee Notes, 1991 amendment. In view of the Second Circuit finding that the trial court had erroneously stated the common law of Connecticut and that petitioner "did

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[4] As used in these decisions, the terms "plain error" and "manifest injustice" are simply two alternative ways of describing the same appellate standard of review. *See* Wright & Miller, *supra* § 2536, at 331 (1995 & Supp.).

not (and could not)" sustain his abuse of process claim under a correct statement of Connecticut law, the Second Circuit had an affirmative obligation to correct the error below and order judgment for respondents on petitioner's counterclaim.

II. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS AS TO THE APPLICABLE LEGAL PRINCIPLE

Petitioner erroneously contends that there is a conflict among the circuit courts on whether review for manifest injustice (or plain error) is permissible when a pre-verdict timely motion for judgment as a matter of law fails to satisfy the specificity requirement of Rule 50(a)(2). As discussed above, there is no need for this Court to reach that issue in this case. Moreover, this purported conflict is imaginary only. Petitioner is unable to point to a single decision that prohibits appellate review of a sufficiency of evidence claim under a manifest injustice or plain error standard where a timely motion for judgment as a matter of law was made but did not satisfy the specificity requirement of Rule 50(a)(2).

Petitioner commits several errors in conjuring up this supposed conflict. First, petitioner fails to inform this Court of decisions from supposedly "conflicting" circuits that demonstrate that these circuits do in fact review judgments to prevent manifest injustice or remedy plain error, even where, unlike here, no motion for judgment as a matter of law was filed. For example, while petitioner claims there is a conflict between the Second and Federal Circuits, in *Biodex Corp. v. Loredan Biomedical, Inc.*, *supra*, the Federal Circuit stated, "[W]hen no motion challenging the legal sufficiency of the evidence has been made at any stage in the district court, the law is uniform in all circuits that review is limited to plain error." 946 F.2d at 854 (citations omitted). *See also Acoustical Design, Inc. v. Control Electronics Co.*, 932 F.2d 939 (Fed. Cir.), *cert. denied*, 502 U.S. 863 (1991). Again, completely contrary to petitioner's representations, the Eighth Circuit, in *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 655 (8th Cir. 1995), held unequivocally that it has adopted an exception to

Rule 50 allowing "litigants to present sufficiency of the evidence challenges where not to do so would constitute plain error that would result in a manifest miscarriage of justice." *Id.* (citations omitted). Petitioner similarly misrepresents the positions of the Eleventh and Third Circuits on this issue. *See Narey v. Dean*, 32 F.3d at 1526-27; *Repola v. Morbank Industries, Inc.*, 934 F.2d 483, 489 n.6 (3rd Cir. 1991); *Coker v. Amoco Oil Co.*, 709 F.2d 1433 (11th Cir. 1983).

Indeed, even in decisions cited by petitioner, courts acknowledge or adopt the same standard applied by the Second Circuit, but simply find that on the particular facts presented the appellant failed to demonstrate plain error or manifest injustice. *See, e.g., EEOC v. Wessel*, 55 F.3d 1276, 1286 n.15 (7th Cir. 1995) (court neither accepts nor rejects plain error or manifest injustice exception but notes "if we were to accept it, we would certainly see no plain error or manifest injustice in this case"); *First Security Bank v. Taylor*, 964 F.2d 1053 (10th Cir. 1992) (court affirms trial court's denial of JNOV where no plain error).

The second error that petitioner commits in his effort to create a conflict that does not exist, is that he improperly assumes that if a court does not discuss the manifest injustice/plain error standard, the circuit court has rejected it. Thus, petitioner relies on *Whelan v. Abell*, 48 F.3d 1247 (D.C. Cir. 1995); *Preferred RX, Inc. v. American Prescription Plan*, 46 F.3d 535 (6th Cir. 1995); and *Murphy v. City of Long Beach*, 914 F.2d 183 (9th Cir. 1990). Yet, in each of these cases, the courts never discussed the manifest injustice standard, and therefore they certainly did not reject it. It is impossible to determine from those decisions whether the appellants in those cases ever even raised the issue, let alone whether the proof, of lack thereof, would have satisfied the standard. Significantly, none of the commentators on the *Federal Rules* note any conflict in the circuit courts on this issue. *See* 5A James W. Moore, et al., *Moore's Federal Practice* 50.12 (2nd ed. 1996); 9A Wright & Miller, *supra*, § 2536 at 331 (1995 & Supp.)

Finally, in his haste to create a conflict, petitioner simply invents an issue that is not presented either by the facts of this case or the holdings below. Thus, petitioner asserts that the issue presented is whether the Second Circuit entered judgment on a "ground not raised in a pre-verdict motion" (Petition at i), thereby implying that respondents presented one ground for their motion for judgment and that the Second Circuit entered judgment for them on an entirely different ground. Petitioner then claims that this imagined holding of the Second Circuit conflicts with decisions of other courts.

But that certainly is not the holding of the Second Circuit or the facts of this case. Petitioner never specifies what "other ground" was raised in respondents' motion for judgment as a matter of law before the District Court. And for good reason. Only one ground--the sufficiency of petitioner's evidence on his counterclaim for abuse of process under a correct statement of Connecticut law--was ever asserted by respondents or discussed by the trial court. A-11 to -14. And, that was the identical ground on which the Second Circuit entered judgment for respondents. A-19 to -22.

Thus, the cases that petitioner cites to create a "conflict" present factual circumstances that are not at all presented by this case and were not addressed by the Second Circuit. *See, e.g., Jones Truck Lines, Inc. v. Full Service Leasing Corp.*, 83 F.3d 253, 258 (8th Cir. 1996) (where motion for judgment only on "ordinary course issue" and motion for new trial on "new value" issue, appellate court will not enter judgment on "new value" issue); *Hoechst Celanese Corp. v. BP Chemicals Ltd.*, 78 F.3d 1575 (Fed. Cir. 1996) (where directed verdict motion focused entirely on one issue, JNOV on ground other than one presented in directed verdict motion is not appropriate); *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1172-74 (3rd Cir. 1993) (appellate court would not consider merits of foreseeability of damages issue not raised in pre-verdict motion).[5]

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[5] Other cases relied upon by petitioner raise the issue whether the trial judge could enter judgment as a matter of law on grounds that the trial

(Footnote continued)

In sum, the Second Circuit's alternative decision to review respondents' sufficiency of the evidence claim to prevent manifest injustice is well supported by the facts of this case and decisions of other circuits. Furthermore, there is no conflict of law between the decision of the Second Circuit and the holdings of other circuits that have addressed this issue.

III. THERE IS NO REASON FOR THIS COURT TO ADOPT UNIFORM RULES FOR THE APPLICATION OF THE MANIFEST INJUSTICE STANDARD

Petitioner's final contention is that this Court should grant his Petition in order to announce national standards for applying the manifest injustice standard. This claim is frivolous. The Second Circuit's decision to enter judgment for respondents was based upon a close reading of the factual record to determine whether the trial court was properly informed of the grounds for their motion, the nature of the error made by the trial court, and whether petitioner could have cured the defects in his case even if respondents' motion had been more specific. Petitioner has given no indication how one-size-fits-all rigid rules could improve what inevitably must be a fact-specific inquiry in each case. Indeed, petitioner has not even suggested what "essential" factors the Second Circuit failed to consider in assessing the totality of the record presented by this case. The appellate courts are best able to review the individual facts and circumstances presented by the trial record in each case, and to correct plain error to prevent manifest injustice, when, as here, that is necessary.

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judge itself raised *sua sponte*, also a circumstance not presented here. *See, e.g., Murphy v. City of Long Beach*, 914 F.2d 183, 186 (9th Cir. 1990); *Kutner Buick, Inc. v. American Motors Corp.*, 868 F.2d 614, 617 (3rd Cir. 1989).

Respectfully submitted,

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Date: December 11, 1996

Attorneys for Respondents Doctor's Associates, Inc. and Franchise World Headquarters, Inc.

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

_____X

DOCTOR'S ASSOCIATES, INC. and FRANCHISE WORLD HEADQUARTERS, INC.,

Plaintiffs,

-against-

JOHN MICHAEL WEIBLE,

Defendant.

_____X

MEMORANDUM DECISION

3:92-cv-574 (GLG)

Plaintiffs have moved for Judgment as a Matter of Law pursuant to Federal Rule of Civil Procedure 50(b), as to defendant's counterclaim for abuse of process. The surface legal issues raised by this motion are easily dealt with. Plaintiffs' motion fails unless they can show that "there [was] no legally sufficient evidentiary basis for a reasonable jury to find for" defendant as to his counterclaim. Fed.R.Civ.P. 50(a)(1). The charge to the jury on this issue, to which plaintiffs did not take exception, stated:

> Abuse of process occurs when a person uses a legal process against another in an improper manner or to accomplish a purpose for which it was not designed. If you find that plaintiffs began this lawsuit against Mr. Weible to coerce him into settling his action against plaintiffs, rather than primarily to bring him to account for what they believed to be his unauthorized use of their voice mail system, then you will find for Mr. Weible on this counterclaim.

There was evidence in this case from which a reasonable jury could have found for defendant on his abuse of process

claim, as charged. There was evidence of bad blood between defendant and plaintiffs, and there was evidence that an employee of plaintiffs' named Gerald Hadelman who had confessed to breaking into plaintiffs' voicemail system had been treated differently (and arguably more leniently) than was defendant.

The real purpose of plaintiffs' motion is to reargue the issue of whether defendant should have been allowed to assert a counterclaim for abuse of process. However, this issue was settled before this case was transferred to the undersigned. In March 1993, plaintiffs moved to dismiss defendant's counterclaim, arguing that because the claim focussed on the filing of the action, it was essentially a claim for vexatious suit, which cannot be asserted as a counterclaim while plaintiffs' action is still pending. Magistrate Judge Margolis denied plaintiffs' motion in a Recommended Ruling dated June 6, 1993, which was endorsed by Judge Daly on July 12, 1993.

While we have doubts as to the correctness of the ruling, it is clearly the law of the case. Litigants cannot reargue settled issues simply because a case is transferred. Plaintiffs will have to make their arguments before the Court of Appeals.

However, we do agree with plaintiffs that there was no sufficient evidentiary bases for the jury to award defendant $95,000 in compensatory damages, when the only damages defendant presented evidence of at the trial were $56,555.83 in legal expenses in defending against plaintiffs' lawsuit. Defendant argues that since the jury was told that this figure did not include fees for the trial itself, it could have reasonably inferred that defendant had additional expenses in attorneys fees as well as travel and lodging expenses. Plaintiffs respond that if this was indeed how the jury arrived at their figure, then they were engaging in mere guesswork. We agree with plaintiffs, and accordingly we will reduce the jury's award of compensatory damages on defendant's counterclaim to $56,555.83. (Plaintiffs make no argument with respect to the jury's award of punitive damages.)

In conclusion, plaintiffs' motion for Judgment as a Matter of Law [131-1] is granted in part, to the extent of reducing the jury's award of $95,000 in compensatory damages to $56,555.83, and otherwise denied.

SO ORDERED

Dated Bridgeport, Connecticut
August 8, 1995.

/s/ Gerard L. Goettel

GERARD L. GOETTEL
U.S.D.J.